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In the Supreme Court of the United States

OCTOBER TERM

No. _____

GEORGE McGOWAN,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix "A") is reported as *McGowan* v. *State*, 258 So.2d 801 (Miss. 1972).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the right to trial by jury extend to a case wherein the defendant is sentenced to a five-month term of imprisonment and is fined Five Hundred Dollars ($500.00)?

STATEMENT OF FACTS

On March 27, 1971, in the Chancery Court of Jefferson Davis County, Mississippi, the Petitioner and his premises were found to be a common nuisance in that Petitioner was keeping and selling intoxicating liquor. Petitioner was enjoined from having unlawful intoxicating liquor on his premises as provided by §2646, Mississippi Code of 1942, Annotated (1956). Petitioner was then cited for contempt of court for violating the injunction and thereupon moved the court to grant a jury trial on the contempt issue. A motion for a jury trial was overruled and the issue was tried before the Chancery Judge who found the Petitioner guilty of contempt and imposed a penalty of five months imprisonment in the County jail and a fine of Seven Hundred Fifty Dollars ($750.00). Petitioner appealed his conviction to the Supreme Court of Mississippi wherein his conviction was affirmed with the sentence being reduced to five months imprisonment in the County jail and a fine of Five Hundred Dollars ($500.00).

Petitioner now seeks to have this Court grant Certiorari in order to determine whether he could receive a five-months jail sentence and a Five Hundred Dollar ($500.00) fine without having been tried by a jury.

ARGUMENT

The Petitioner Had No Constitutional Right to a Trial by Jury on His Contempt Citation Wherein He Was Ultimately Sentenced to Serve a Term of Five Months in the County Jail and Was Ordered to Pay a Five Hundred Dollar Fine.

Of primary concern in this case is the determination of what crime should be considered a "petty" crime and what crime should be considered a "serious" crime for purposes of deciding whether or not a defendant is entitled to a trial by jury. The cases cited by the petitioner are the principal cases wherein this Court has considered the question in recent years. These questions taken chronologically form a basic outline of the attempt of the courts to form a fair and objective standard by which the right of a person or corporation to a jury trial may be determined. At the same time, these decisions have also examined the peculiar nature of criminal contempt in this regard.

In the case of *Cheff* v. *Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966), the Court first held that sentences exceeding six months may not be imposed by federal courts in the absence of a jury trial. It should be noted that this was decided on the grounds of the supervisory power of the court (see *Cheff, supra*, 384 U.S. at 380, 16 L.Ed.2d at 634, and the separate concurring Opinion of Mr. Justice Harlan, 384 U.S. at 381, 382, 16 L.Ed.2d at 634, 635) and not on constitutional grounds. The Court held:

> "According to 18 U.S.C. §1 (1964 ed.), '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months' is a 'petty of-

fense.' Since Cheff received a sentence of six months imprisonment (see District of Columbia v. Clawans, supra, 300 U.S. at 627-628, 81 L.Ed. at 847, 848), and since the nature of criminal contempt, an offense sui generis, does not, of itself, warrant treatment otherwise (cf. District of Columbia v. Colts, supra), Cheff's offense can be treated only as 'petty' in the eyes of the statute and our prior decisions."

Two years later in *Duncan* v. *Louisiana*, 391 U.S. 145, 48 S.Ct. 1444, 20 L.Ed.2d 491 (1968), this Court held that where a state statute provided that the appellant could be sentenced to a period of two years for the crime of simple battery, that it was a "serious" crime and that the appellant was entitled to a jury trial as a matter of constitutional right under the Sixth and Fourteenth Amendments.

The Court, however, did not attempt to define "petty" and serious offenses to any greater degree than to say that an offense which carries a sentence of six months or less is a petty offense and that a crime punishable by a sentence of two years in prison is a "serious" one. In that case this Court stated:

> "We need not, however, settle in this case the exact location of the line between petty offense and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."
>
> (391 U.S. 145 at 161, 20 L.Ed.2d 491 at 503)

In *Duncan, supra*, the Court again distinguished its treatment of criminal contempt where no statutory maximum sentence is prescribed from other crimes with maximum sentences fixed by statute. In Note 35, 391 U.S. 145 at 162, 20 L.Ed.2d 491 at 503, the Court explains:

"It is argued that Cheff v. Schnackenberg, 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523 (1966), interpreted the Sixth Amendment as meaning that to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of sentence authorized but the length of the penalty actually imposed. In our view that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. Cheff involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require a jury trial absent a long sentence. In addition, criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the punishment which can be imposed. The contempt statute under which Cheff was prosecuted, 18 U.S.C. §401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in Cheff seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which Cheff was tried."

It should be noted that an important distinction is made in the test applied to determine the "seriousness" of a crime where the legislature has set a maximum penalty by statute, and where the legislature has seen fit to leave the penalty entirely to the courts. In *Duncan, supra*, the court looked to the maximum sentence that could be imposed where the maximum penalty had been set by statute. (See also: *Frank* v. *United States*, 395 U.S. 147, 148, 23 L.Ed.2d 162, 165, 89 S.Ct. 1503 (1969); *District of Columbia* v. *Clawans*, 380 U.S. at 628, 81 L.Ed. at 848). In

Bloom v. *Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), decided the same day as *Duncan*, *supra*, this Court looked to the penalty actually imposed as the best guide in absence of a statutory maximum sentence following the rule in *Cheff*, *supra*.

The Supreme Court of Mississippi in the case of *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969), adopted the reasoning of *Bloom*, *supra*, in that the punishment imposed should be looked to in determining whether the offense is petty or serious and that ". . . where the confinement is not more than six months and the fine not more than $500.00, that the offense is a petty one and the accused not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States." *Bloom* v. *Illinois*, *supra*.

Subsequent to the holding of this Court in *Cheff*, *Duncan* and *Bloom*, this Court has further defined a "serious" crime in *Baldwin* v. *New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970). Whereas, in *Duncan*, *supra*, the Court had held that a potential statutory sentence of two years made the crime a serious one, the Court in *Baldwin*, *supra*, held a "serious" crime to be one with a potential sentence of over six months, stating that ". . . no offense can be deemed 'petty' for the purpose of the right to trial by jury where imprisonment for more than six months is authorized." (399 U.S. 66 at 69, 26 L.Ed.2d 437 at 440).

Subsequent to these decisions the present state of the law was clearly rationalized and explained by the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Snyder*, 275 A.2d 312 (Pa. 1971). That case is very similar to the one at bar. The defendant appealed on an order of the lower court imposing sentences for two contempts, each of which was for less than six months. Like Mississippi, Pennsylvania has no statutorily estab-

lished maximum sentence for criminal contempt in the respective areas with which these cases are concerned. The lucid discussion of the present law applying to the situation as stated by the Supreme Court of Pennsylvania is as follows:

"Since the contempt conviction occurred on October 2, 1970, we must determine appellant's right to jury trial in light of the decision of the Supreme Court of the United States, especially in Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (June 22, 1970). The decision of the United States Supreme Court in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, and Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, clearly established that a defendant was entitled to a jury trial for a serious offense. However, there was much confusion as to what constituted a serious offense as distinguished from a petty offense. This confusion was laid to rest in Baldwin v. New York, 399 U.S., page 68, 90 S.Ct. page 1800, supra, in which the court said: '. . . we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

"Pennsylvania does not have a statutorily established maximum sentence for direct criminal contempts and therefore we must look to the length of the sentence which the court actually imposed to test for 'seriousness'. Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, supra. In this case, each of the two sentences which were imposed for the two separate direct criminal contempts was less than the 'more than six months' standard which was established as the cut-off point between 'petty' and 'serious' crimes. Therefore, Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886,

supra, in no way required appellant to be given a jury trial on either of said contempt charges."

Baldwin, supra, has apparently left the rule of *Bloom, supra,* intact; that where no maximum penalty is prescribed by statute the punishment actually imposed will be looked to in the determination of whether the crime falls into the category of "petty" or "serious." (See: *Commonwealth* v. *Fletcher,* 269 A.2d 727 (Pa. 1970)).

In the present case the petitioner was convicted for a violation of an injunction prohibiting the sale of liquor under the authority of Section 2646, Mississippi Code 1942 Annotated (1956), which does not provide a penalty for violation of the injunction. The Supreme Court of Mississippi has held this violation to be criminal contempt, *Church* v. *State,* 239 Miss. 1, 111 So.2d 228 (1959), with authority to punish derived by the chancery courts of this State through Section 1278, Mississippi Code of 1942 Annotated (1956). *Murphy* v. *State,* 202 Miss. 890, 32 So.2d 875 (1948). That statute sets no maximum penalty for contempt. There being no statutory maximum penalty in Mississippi in reference to criminal contempt of the nature for which petitioner was found guilty, the rule of *Bloom* and *Hinton, supra,* should be applied and the penalty actually imposed by the sentencing court will be looked to in determining whether or not the crime is serious or petty.

Applying this rule to the sentence received by the petitioner, the five months sentence given in the present case is less than the six months maximum sentence set for petty offenses in *Hinton* and *Baldwin, supra,* therefore, the crime is a "petty" one and the petitioner is not entitled to a jury trial because of the length of his sentence.

The petitioner, however, goes one step further contending that the $750.00 fine imposed by the lower court or even a $500.00 fine subjects an individual to a "possible" sentence of greater than six months as defined in *Baldwin*. The petitioner was ordered to stand committed until his fine was paid in accordance with Section 2540 and Section 7899, Mississippi Code of 1942 Annotated (1956). The petitioner, admittedly not an indigent, reasons that should he refuse to pay his fine he would be required to remain in jail and receive credit toward the payment of his fine in the amount of $3.00 per day under Section 7906, Mississippi Code 1942 Annotated (1956). A $750.00 fine would thus subject him to an additional 250 days in jail, or a $500.00 fine would subject him to an additional 167 days in jail. This contention of the petitioner is unsupported by reason or by decisions of the courts. Historically, a fine which might result in an additional sentence has not been considered as having any bearing on the question of the length of the prison sentence for purposes of determining the right to trial by jury (See *Ex parte Wilson*, 114 U.S. 417, 428, 55 S. Ct. 253, 29 L.Ed. 89, *People* v. *Bellinger*, 269 N.W. 265, 271 199 N.E. 215, *Matter of McKinley* v. *Hamilton*, 282 N.Y. 393, 397, 26 N.E.2d 949, 951; 127 ALR 1283.)

Commitment of the convicted defendant to jail until his fine is paid is no part of the punishment for his offense. The penalty or the punishment adjudged is the fine, and the custody adjudged is the mode of executing the sentence, that is of enforcing the payment of his fine. 21 Am. Jur. 2d, *Criminal Law*, §603, page 557 (See: *Anderson* v. *Shackelford*, 74 Fla. 36, 76 So. 343; *Ex parte Bryant*, 24 Fla. 278, 4 So. 854).

Imprisonment for failure to pay a fine does not arise from the crime committed by the appellant, but from his

entirely separate and distinct refusal to obey the decree of the sentencing court. Any refusal to pay by the appellant is an act of disobedience consisting solely in refusing to do what has been ordered and not in doing what has been prohibited by the Court. That the appellant stand committed until paying his fine is not intended as punishment but as a method of forcing him to obey the order of the court. As was ably put by the Court in *Gompers* v. *Buck's Stove and Range Company*, 221 U.S. 418 at 441; 55 L.Ed. 797 at 806, 31 S.Ct. 492 (1911), the petitioner ". . . carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

As previously stated, the petitioner is not an indigent and would be imprisoned in excess of five months only because of his refusal to obey an order of the court and pay his fine. The courts have held in recent years that an indigent may not be imprisoned beyond a maximum term specified by statute solely because of his failure to pay a fine and court costs; however, as stated in *Morris* v. *Schoonfield*, 399 U.S. 508, 90 S.Ct. 2232, 26 L.Ed.2d 773, 774 (1970), these cases do ". . . not mean that a state cannot jail a person who has the means to pay a fine but refuses or neglects to do so."

The petitioner contends the maximum fine which may be imposed in the trial of the crime without a jury is limited to $500.00, and that the imposition of the $750.00 fine is sufficient to take a crime out of the category "petty" crime and make it a "serious" crime which would require a jury trial.

As previously stated, fines have historically not been a determining factor in considering the seriousness of a crime. The issue is what bearing the recent decisions of

the courts, beginning with *Cheff, supra*, have had on the role of a fine in determining the seriousness of an offense.

The recent decisions of this Court on the determination of the seriousness of a crime have made only brief mentions of fines, and none of these cases have considered fines as a factor in making the determination. In fact, the Court, beginning with *Cheff, supra*, and going down through *Baldwin, supra*, have avoided including the question of fines in determining the line between petty and serious crimes.

In *Cheff, supra*, no mention was made of a crime in determining the seriousness of a crime. The decision of the six months limitation in federal cases was based on 18 U.S.C., §1, part of which provides:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500.00, or both, is a petty offense."

Until the decision in *Cheff, supra*, this statute had not been regarded as a maximum limit for determination of a petty offense in regard to the length of imprisonment or the amount of fine, but rather as a minimum standard for determining a serious offense. A petty offense could still be greater than that provided in 18 U.S.C., §1. When *Cheff, supra*, set the maximum limit of a petty offense at six months imprisonment along the lines of 18 U.S.C., §1, it made no mention whatsoever of that portion of the statute dealing with fines.

At the same time, the Court in *Cheff, supra*, did not mention the fact that Cheff had been charged with contempt of court along with Holland Furnace Company, which was fined $100,000.00. Although Cheff was granted a petition for certiorari, for a determination of whether

his six months imprisonment without a jury trial was a violation of the constitutional right, the petition of the Holland Company, of which he was formerly President and a Chairman of the Board, was denied at *Holland Furnace Co.* v. *Schnackenberg*, 381 U.S. 924, 14 L.Ed.2d 683, 85 S.Ct. 1559 (1965). Thus, the $100,000.00 fine given the corporation apparently was not considered by the Court to be of the nature requiring review for purposes of determining the right to a jury trial.

In the case of *Duncan* v. *Louisiana*, *supra*, in holding the Sixth Amendment right to a jury trial applicable to the states, the Court refused to follow the guidelines of 18 U.S.C., §1, regarding even the six month limitation which it had upheld under the supervisory powers of the court regarding the federal system. There was no mention whatsoever of the fine except in a one sentence reference to the 18 U.S.C., §1, definition of petty offense. Likewise, in the case of *Bloom*, *supra*, where the Court held the Sixth Amendment right to a jury trial applicable to serious contempts, there was no mention made of the fine.

In the case of *Baldwin*, *supra*, where the Court held that there is a Sixth Amendment right to a trial by jury for any offense where the authorized punishment is over six months, the question of fines is examined only in regard to the 18 U.S.C., §1, definition of petty offense in the federal system and there was no holding by the Court that the amount of a fine can take the crime out of the category of "petty" and place it in the "serious" category.

In case of a prison sentence, there is little variance in the harshness of penalty from place to place and over a period of time as applied to an individual. However, there is a great variance in the financial situation of different individuals depending on class, education and geographical location which might render a set fine inconsequential

in impact for some and not for others. In addition, the great fluctuation and monetary value over a period of time makes an additional factor of instability. It is not difficult to understand that the Courts have refused to consider the amount of a fine in the determination of whether an offense is petty or serious for purposes of the right to trial by jury.

In the case of *In re Duehrer*, 236 A.2d 592 (N.J. 1967), the Supreme Court of New Jersey considered the question in the determination of the "outer limits of punishment with respect to offenses below the grade of crime" and found that "the amount of the fine presents no problem."

This question was also considered by the New York Supreme Court in the case of *Rankin* v. *Shanker*, 23 N.Y.2d 111, 295 N.Y.S.2d 625, 242 N.E.2d 802 (Ct. App. 1968), wherein an individual and a union were found guilty of contempt of court in violating a temporary injunction against a strike. In considering the fine imposed on the union, the Court made the following statement:

> "Nor does the penalty to which defendant unions are subject—a fine of $10,000.00, a day or 1/52 of the total amount of annual membership dues, 'whichever is the lesser' (Judiciary Law §751, subd. 2, par. [a])—render the contempt a 'serious' crime. The determination of whether it is serious or petty under the decision, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence . . . Consequently, as the cases reveal, the fine, even though sizeable in amount, furnishes no valid criterion for the defendant's claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any

relevance, the fine—which in the last analysis must be borne by the union membership (See e.g. Martin v. Curran, 303 N.Y. 276, 281, 101 N.E.2d 683, 686)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt." See also: *In re Jersey City Education Association*, 278 A.2d 206 (N.J. 1971).

However, in *Cheff, supra*, wherein this Court held that through its supervisory powers over the federal courts a sentence exceeding six months might not be imposed by federal courts absent a jury or waiver thereof, this Court stated:

> "Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries."
>
> (384 U.S. 373 at 380, 16 L.Ed.2d 629 at 634)

The Supreme Court of Mississippi, in considering the petitioner's appeal reduced the petitioner's sentence of five months imprisonment and $750.00 fine to a five month sentence and a $500.00 fine. Such sentence was well within the boundaries of 18 U.S.C., §1, which defined a petty offense as any offense wherein the penalty does not exceed imprisonment for a period of six months or a fine of not more than $500.00 or both. And, in such cases, an individual has no guaranteed right to a trial by jury.

Therefore, the respondent respectfully submits the petitioner was afforded every constitutional right and the Petition for Writ of Certiorari now before this Court should be denied.

CONCLUSION

The sentence received by the petitioner on his conviction of contempt of court was well within the boundaries of a petty offense, and in such cases there is no vested right to a trial by jury.

Respectfully submitted,

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